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# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1132

STATE OF CALIFORNIA and
WALTER R. PEDRETTI,
Chief of Police of the City of San Pablo,
*Petitioners,*

vs.

ALBERT J. GIANNINI and
KELLEY ISER,
*Respondents.*

## Petition for Writ of Certiorari to the Supreme Court of the State of California

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# In the Supreme Court of the United States

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No. .....

STATE OF CALIFORNIA and
WALTER R. PEDRETTI,
Chief of Police of the City of San Pablo,
*Petitioners,*

vs.

ALBERT J. GIANNINI and
KELLEY ISER,
*Respondents.*

## Petition for Writ of Certiorari to the Supreme Court of the State of California

The People of the State of California and Walter R. Pedretti, Chief of Police of the City of San Pablo, County of Contra Costa, State of California, pray that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in this case on November 14, 1968.

### OPINIONS BELOW

The opinion of the Supreme Court of the State of California, printed in Appendix A hereto, is reported in 69 A.C. 588, 72 Cal.Rptr. 655, and 446 P.2d 535 (Nov. 14, 1968).

## JURISDICTION

The Supreme Court of the State of California entered judgment in this case on November 14, 1968. A timely petition for rehearing was filed on November 29, 1968 (R. 396). The petition was denied on December 11, 1968 (R. 425).

Petitioners invoke the jurisdiction of this Court under subdivision (3) of section 1257 of Title 28, United States Code, since a right has been especially set up and claimed under the Constitution of the United States.

## QUESTIONS PRESENTED

1. Whether a "topless' dance act performed before patrons in a nightclub is conduct which is protected by the freedom of expression provisions of the First Amendment applicable to the States through the Fourteenth Amendment.

2. Whether in judging allegedly obscene matter, the element of patent offensiveness to contemporary community standards relating to the description or representation of sexual matters must be measured by reference to a national, statewide or local community standard.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the provisions of California Penal Code sections 311, 314 and 647 are set forth in Appendix B hereto.

## STATEMENT OF THE CASE

Respondent Albert J. Giannini was the manager of a nightclub called the Lighthouse Inn located in the City of San Pablo. Respondent Kelley Iser was employed there

as a "topless" dancer (R. 9-10). On August 12, 1965, both respondents were charged in a criminal complaint filed in the San Pablo Municipal Court with violations of California Penal Code section 314, subdivision (1) (indecent exposure), section 647, subdivision (a) (lewd and dissolute conduct in public), and section 650½ (outraging public decency). California's anti-obscenity laws (Calif. Pen. Code §§ 311, 311.2) were not involved (R. 8-9).

The charges arose out of a "topless" dance act performed by respondent Iser on August 6th and 12th, 1965. On those dates she appeared on stage wearing a transparent cape and "tights" and performed "modern dances" which were described as having "sexual connotations." She was accompanied by a three-piece band made up of two guitarists and a drummer. Part way through her performance she removed the transparent cape, completely exposing the upper part of her body. During the performance on August 12th, her final number was called "Walking the Dog," during which she "gyrated" while on her hands and knees (R. 83-95, 113-130).

Following a jury trial, respondents were found guilty of the crimes of indecent exposure (Calif. Pen. Code § 314, subd. (1)) and lewd and dissolute conduct in public (Calif. Pen. Code § 647, subd. (a)). They were acquitted of the charge of outraging public decency (R. 8).

Appeals by both respondents were perfected to the Appellate Department of the Superior Court. The convictions were affirmed (R. 12-13). Respondents then sought a writ of habeas corpus in the California Supreme Court (R. 1-43.) That court granted the writ and set aside the convictions (R. 357-395). It held that "topless" dancing was prima facie protected expression under the First Amendment (R. 363-371) and that since the prosecution failed

to introduce expert testimony concerning the elements of appeal to prurient interest and patent offensiveness to contemporary community standards relating to the description or representation of sexual matters, the convictions had to be vacated (R. 375-381; Appendix A, *infra*).

## HOW THE FEDERAL QUESTIONS AROSE

The federal questions arise out of the California Supreme Court's conclusion that the words "lewdly" in subdivision (1) of California Penal Code section 314 and "lewd or dissolute" in subdivision (a) of California Penal Code section 647 meant "obscene" in the constitutional sense. Appendix A, *infra*, p. 9, n. 4; *In re Giannini and Iser*, 69 A.C. 588, 596 n. 4, 72 Cal.Rptr. 655, 661, 446 P.2d 535, 541 (1968). By this wholesale revision under the guise of statutory interpretation,[1] the California court transformed this case into a full-blown First Amendment-obscenity case. The California court then raised the first issue which we present by concluding that a "topless" dance act performed before a nightclub audience was entitled to prima facie First Amendment protection since it was a form of expression to which such protections should apply.

The second issue is presented by the California court's treatment of the sufficiency of the evidence introduced by the prosecution to establish the elements of obscenity. After concluding that the prosecution had not met its burden of proof, the court held that the prosecution must prove through expert witness testimony that the conduct exceeded contemporary community standards of decency relating to

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1. On petition for rehearing we vigorously challenged the court's "interpretation." See Petition for Rehearing (R. 396, 404-409.) we recognize, however, that this Court must accept the interpretation placed on these statutes by the California Supreme Court. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959).

the description or representation of sexual matters. Then, however, it established the geographical boundaries of that "community" as the State of California. Appendix "A," *infra,* pp. 18-21; *In re Giannini and Iser,* 69 A.C. 588, 602-605, 72 Cal.Rptr. 655, 661-67, 446 P.2d 535, 541-46 (1968).

## REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

### I. The Decision of the California Supreme Court Holding That "Topless" Dancing Before a Nightclub Audience Is a Form of Communication Entitled to the Full Freedom of Speech Protections Afforded by the First and Fourteenth Amendments Is Not Required by the Decisions of This Court.

The decisions of this Court in the obscenity area have dealt exclusively with fixed media of expression. Thus, books, magazines, photographs and motion pictures have been the exclusive subject matter of the Court's decisions. This case does not involve any of these. We are here concerned with actual conduct or a live performance. In this case, the California Supreme Court has concluded that the live performance of a "topless" dance before an audience in a nightclub was a form of communication or expression to which the Federal Constitution accorded full freedom of speech protections. It did so in the belief that this result was compelled by the First and Fourteenth Admendments. We submit that this decision was in error. A recent decision of this Court indicates different treatment may be accorded to live conduct which is engaged in with a view toward expression.

In *United States v. O'Brien,* 391 U.S. 367 (1968), this Court stated:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376.

In that case, David Paul O'Brien burned his draft card on the steps of a Boston Courthouse as a serious, symbolic act of anti-war protest. He was prosecuted for this act of destroying his selective service registration card. His actions were held to be beyond the freedom of expression protections of the First Amendment. In the present case, respondent Kelley Iser performed a "topless" dance described by its title as "Walking the Dog" in a nightclub managed by respondent Giannini. Her conduct, the California Supreme Court held, was fully protected by the First Amendment unless it could be found obscene in the constitutional sense. The contrasting treatment is so disparate as to defy rational explanation.

It may be that the First Amendment has an "exceptional enclave"[2] for obscene materials, but we submit that live sexual misconduct incorporating no discernible message should be beyond the First Amendment's protective mantle. As Mr. Justice Douglas has said, "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the ground of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery and other phases of sexual misconduct." *Roth v. United States*, 354 U.S. 476, 512 (1957) (dissenting opinion).

The decision in the *O'Brien* case was based upon the concept that, when "speech" and "non-speech" elements are combined in the same course of conduct, sufficiently important governmental interests justify limitations on the "speech" element despite First Amendment freedoms. Just as the Court in *O'Brien* found that there were adequate paramount interests warranting limitation of David Paul O'Brien's freedom to express his anti-war viewpoint by

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2. *United States v. Klaw*, 350 F.2d 155, 163 (2nd Cir. 1966).

unlawful conduct, we submit that the states have legitimate and overriding interests in prohibiting sexual misconduct performed live before public audiences. These interests should be upheld regardless of the incidental effect such prohibitions may have on the "communicative" element of a barroom, stage or other alleged "theatrical" performance in which such acts of misconduct may be performed.

It is one thing to portray nudity and sexual misconduct in fixed communicative media such as books, magazines, photographs and motion pictures, but quite another to demonstrate such conduct on stage and live. Where such conduct is engaged in during an alleged "theatrical" performance, it is no less the subject of legitimate state regulation than it would be if performed off stage. Such conduct should not achieve limited immunity by the simple measure of surrounding it with an ostensible theatrical prop. Acts of oral-genital copulation, sodomy, masturbation and other phases of sexual perversity manifestly have no significant element of legitimate communication involved in them. Yet, the effect of the California Supreme Court's decision is to accord full First Amendment protection to this kind of sexual misconduct when it is incorporated into a stage or theatrical performance.

The decision of the California Supreme Court has already been held applicable to the performance of a one act "play" during the final scene of which the male and female performers "simulate" an act of oral-genital copulation. *See, Dixon v. Municipal Court,* 267 A.C.A. 875, 73 Cal.Rptr. 587 (1968).

We submit that the orderly development of the constitutional law of obscenity and the need for definitive guidance in this area of live obscene performances, indicates the compelling need for this Court to grant certiorari in this case. The question is one of substance and no previous decision by this Court adequately resolves it.

**II. The Irreconcilable Conflicts Among the Decisions of the Highest Courts of Several States and Lower Federal Courts on the Question of What the Geographical Limits of the "Community" Are, by the Contemporary Standards of Which Materials Alleged to Be Obscene Must Be Judged, Requires Review of the California Supreme Court Ruling That the Relevant "Community" Is the State of California.**

After deciding that respondent Kelley Iser's "topless" dance act was to be judged by constitutional obscenity standards, the California Supreme Court concluded that the prosecution was required to prove through expert witness testimony the elements of appeal to prurient interest and patent offensiveness to accepted standards of decency. And, since the prosecution had not met this newly announced requirement, the convictions of respondents had to be vacated. Appendix A at p. 17. However, the court went on to declare, in broad, far-reaching constitutional dictum that, in event of retrial, the proof of offensiveness to accepted standards of decency must be established by reference to the standards of the entire State of California. The opinion stated:

> "With the alternative of using a national community standard eliminated [because the "topless" dance was not intended for nationwide dissemination], the choice lies between a statewide standard and some variant of a local community.
>
> "... [W]e conclude that on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of a small community: whether it should be city, county, individual neighborhood within a city, or whatever." Appendix "A," at p. 21. *In re Giannini and Iser, supra,* 69 A.C. 588, 605, 72 Cal.Rptr. 655, 667, 446 P.2d 535, 547, (1968).

We believe that this simplistic approach does not meet the demands of the First and Fourteenth Amendments.

If the Court should take this case on certiorari, we will not argue for either a nationwide or a local standard to be applied automatically in all obscenity cases. Rather, we believe the determination of the relevant "community" should be made on the basis of the type of media involved, the probable extent of its distribution and the intended or probable recipient audience. *Cf., Ginsberg v. New York,* 390 U.S. 629 (1968); *Mishkin v. New York,* 383 U.S. 502, 507-10 (1966). We would seek to have this Court establish broad constitutional guidelines within which the state courts and legislatures might establish workable rules for delineating the relevant contemporary community standard. At this juncture, however, we do not believe it is in order to express our views on these issues for we seek only to demonstrate why it is imperative that the Court accept this case on writ of certiorari.

When it comes to obscenity under federal mail law, Mr. Justice Harlan, joined by Mr. Justice Stewart, concluded:

> "We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequences of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." *Manual Enterprises v. Day,* 370 U.S. 478, 488 (1962) (footnote omitted).

Two years later, the Court was badly fragmented on the community standards issue. In *Jacobellis v. Ohio*, 378 U.S. 184 (1964), Mr. Justice Brennan and former Justice Goldberg advocated a national standard. *Id.* at 192-195. But, the Chief Justice and retired Justice Clark argued that there was "no provable 'national standard,' and perhaps there should be none." *Id.* at 200 (dissenting opinion). In *Jacobellis*, neither Mr. Justice Harlan nor Mr. Justice Stewart addressed this issue, though it had been considered by them in *Manual Enterprises*.

The division of viewpoint among past and present members of this Court on this pivotal issue of the scope of the relevant "contemporary community," by whose standards of shame and candor in the description or representation of sexual matters alleged obscene materials are to be judged, has resulted in constitutional chaos. Given this divergence of views, it is not surprising that we should find irreconcilable and hopeless conflict among the decisions of the highest courts of many states and the federal courts. Yet, it is the contemporary community standard which is the keystone to constitutional determinations of obscenity. *See, United States v. Kennerly*, 209 F. 119, 121 (D.C.N.Y. 1913).

A national standard has been either adopted or its acceptance indicated by the United States Circuit Courts of Appeal for the District of Columbia,[3] the First Circuit,[4]

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3. *Hudson v. United States*, 234 A.2d 903, 905 (D.C. Cir. 1967).

4. *Excellent Publications Inc. v. United States*, 309 F.2d 362, 365 (1st Cir. 1962).

the Second Circuit,[5] the Third Circuit,[6] the Fourth Circuit,[7] and the Tenth Circuit.[8] Similarly, the states of Arizona,[9] Missouri,[10] Oregon,[11] and Tennessee, [12] have adopted a national standard.

But along with California in the instant case, the states of Wisconsin,[13] and Texas,[14] have permitted a statewide standard. The states of Arkansas,[15] Florida,[16] Louisiana,[17] and West Virginia,[18] have, however, concluded that a local community standard is constitutionally acceptable.

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5. *United States v. Klaw, supra,* 350 F.2d 155, 165 n. 11 (2d Cir. 1965).

6. *United States v. Ginzburg,* 338 F.2d 12, 14 (3rd Cir. 1964), *aff'd sub. nom., Ginzburg v. United States,* 383 U.S. 463 (1966).

7. *United States v. 392 Copies of Magazine Entitled "Exclusive,"* 253 F.Supp. 485, 494 (D.C. Md. 1966), *aff'd sub. nom., United States v. 56 Cartons Containing 19,500 Copies of Mag.,* 373 F.2d 633 (4th Cir. 1967), *rev'd per curiam sub. nom., Central Magazine Sales v. United States,* 389 U.S. 50 (1967).

8. *Haldeman v. United States,* 340 F.2d 59, 62 n.5 (10th Cir. 1965).

9. *State v. Locks,* 97 Ariz. 148, 397 P.2d 949, 951 (1964).

10. *State v. Smith,* 422 S.W.2d 50, 56 n.4 (Mo. 1967), *State v. Vollmar,* 389 S.W.2d 20, 27 (Mo. 1965).

11. *Oregon v. Childs,* ..... Ore. ....., 447 P.2d 304, 309 (1968).

12. *Robert Arthur Management Corp. v. State,* 414 S.W.2d 638, 641 (Tenn. 1967), *rev'd per curiam,* 389 U.S. 578 (1968).

13. *McCauley v. Tropic of Cancer,* 20 Wis.2d 134, 149, 121 N.W.2d 545, 553, 5 A.L.R.2d 1140 (1963).

14. *Carter v. State,* 388 S.W.2d 191 (Tex.Crim.App. 1965) ("community" fixed by statute to be not less than the State itself).

15. *Gent v. State,* 239 Ark. 474, 393 S.W.2d 219 (1966), *rev'd per curiam on other grounds sub. nom., Redrup v. New York,* 386 U.S. 767 (1967).

16. *Felton v. Pensacola,* 200 S.2d 842 (Dist.Ct.App.Fla. 1967), *rev'd per curiam,* 390 U.S. 340 (1968); *Nissinoff v. Harper,* 212 S.2d 666 (Dist.Ct.App.Fla. 1968).

17. *State v. Henry,* 250 La. 682, 198 S.2d 889, 895 (1967), *rev'd per curiam,* 392 U.S. 655 (1968).

18. *State v. Miller,* 145 W.Va.59, 112 S.E.2d 472, 477 (1960).

Significantly, the State of Illinois has three times refused to decide this question. *See, Cusack v. Teitel Film Corp.*, 38 Ill.2d 53, 230 N.E.2d 241, 250 (1967), *rev'd per curiam*, 390 U.S. 139 (1968). And, the Pennsylvania courts appear to be in a state of utter confusion on the issue. Compare *William Goldman Theaters Inc. v. Dana*, 405 Pa. 83, 173 A.2d 59, 66 (1961), *cert. denied*, 368 U.S. 897 (1960) with *Commonwealth v. Dell Publications Inc.*, 427 Pa. 189, 233 A.2d 840, 847 (1967), *cert. denied*, 390 U.S. 948 (1968), and with *Commonwealth v. Baer*, 209 Pa.Super. 349, 227 A.2d 915, 918 n.3 (1967). Maryland recently took the safe course and appeared to decide that an arcade film was obscene under either a local or a national standard. *Sanza v. Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317, 324 (1967).

The State of New Jersey appears to have adopted a variable standard which depends upon the subject matter of the case. Thus, in *State v. Hudson County News Co.*, 41 N.J. 247, 196 A.2d 225, 235 (1963), the Supreme Court unequivocally applied a national standard to fixed media of expression. Yet, more recently, a local community standard was held applicable by a lower appellate court to a live production. *Newark v. Humphres*, 94 N.J.Super. 384, 228 A.2d 550, 553-54 (1967).

This hopeless conflict among the state and federal courts, throughout the nation indicates the imperative need for this Court to restore order to the constitutional law of obscenity. The present state of confusion and the resulting disparate treatment will continue until this Court grants review and provides definitive guidelines for all jurisdictions in this troublesome area.

## CONCLUSION

For the reasons discussed above, we respectfully submit that a writ of certiorari should issue to review the decision of the California Supreme Court.

Dated: March 7, 1969.

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**(Appendices Follow)**

## *Appendix A*

*In the Supreme Court of the State of California*
*In Bank*

Filed—Nov 14 1968

Crim. 11446

In re ALBERT J. GIANNINI and KELLEY ISER on Habeas Corpus.

Our ruling in this case rests on the simple proposition that a dance performed before an audience for entertainment cannot be held to violate the statutory prohibitions of indecent exposure and lewd or dissolute conduct in the absence of proof that the dance, tested in the context of contemporary community standards, appealed to the prurient interest of the audience and affronted standards of decency generally accepted in the community. We explain why we have concluded that both under principles of constitutional law and upon application of the criteria inherent in the involved statutes, conviction could stand only upon presentation of such proof. We likewise set forth our reasons for holding that the relevant community standard is that of the statewide community.

In 1965 a municipal court jury found petitioner Kelley Iser, a "topless" dancer, and petitioner Albert Giannini, the manager of the nightclub in which she danced, guilty of violating Penal Code section 314, subdivision 1 (wilful and lewd exposure) and section 647, subdivision (a) (lewd or dissolute conduct). The appellate department of the superior court affirmed the convictions without opinion; petitioners applied unsuccessfully for transfer of the case to the Court of Appeal.

Giannini and Iser then brought this petition for habeas corpus, alleging that the sections of the Penal Code under which they were convicted are unconstitutionally vague and that the failure of the prosecution to introduce evidence of community standards as to the involved performance rendered the convictions unconstitutional.

1. *The facts.*

Petitioners were convicted of violation of section 314, subdivision 1, and section 647, subdivision (a), of the Penal Code. In relevant part, these sections read as follows: "Section 314. Every person who wilfully and lewdly . . . 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor." "Section 647. Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor: (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

In support of these charges, the prosecution produced two police officers who testified to the following facts. Petitioner Giannini managed the Lighthouse Inn, a nightclub in San Pablo, California; petitioner Iser performed the "topless" dance featured at the Inn. Wearing tights and a transparent cape, Iser appeared on a spotlighted stage and performed various modern dances, including the "Swim." As part of the act, she removed the cape, exposing the upper portion of her body, and performed a dance called "Walking the Dog" to the music of a song by the same name. "Walking the Dog," according to the officers, consisted of petitioner Iser "wiggling around" for about 30 seconds on her hands and knees with her breasts exposed.

The officers testified that a large sign with the word "Topless" stood outside the club. A small sign at the entrance indicated that minors were not allowed inside; an employee of the Lighthouse Inn checked identification at the doorway. The officers further testified that petitioner Iser's performance could not be seen from outside the club. The only other evidence introduced by the prosecution consisted of photographs depicting petitioner Iser dancing; in some of the pictures her breasts were exposed.

At the conclusion of the People's case, defense counsel moved that the jury be advised to return a verdict of "not guilty" because the prosecution had failed to introduce any evidence as to a material aspect of its case, the contemporary standards of the community with respect to the type of dance at issue. Apparently concluding that the jurors represented the "community" and thus by definition would apply "community standards," the trial court denied the request.

After denial of the motion, the defense called as witnesses the owners of two San Francisco nightclubs. They testified that for several years they had continuously employed "topless" dancers who did the "Swim" and other modern dances; that between 30 and 40 other San Francisco nightclubs employed "topless" entertainers, and that "topless nightclubs" engaged in business in Los Angeles, Santa Rosa, San Rafael, San Diego, Petaluma, Eureka, and Red Bluff. One of the owners further testified that his employees nightly performed the dance "Walking the Dog"; the other testified that the small size of the dancing platforms in his club precluded the performance of that dance.

An attorney, also testifying for the defense, stated that during "Walking the Dog" petitioner Iser wiggled her abdominal area and buttocks, that some interpreted this dance as having "sexual connotations," and that he had

seen the same dance rendered on television by fully clothed performers. In addition, the defense introduced various materials generally available in the San Pablo community, such as Playboy magazine and art books, as evidence of contemporary community standards regarding bare-breasted women.

Among other instructions the trial judge charged the jury, quoting Penal Code section 311, that: " 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

We have seen that although defendants were found guilty of violation of the prohibition of indecent exposure in Penal Code section 314, subdivision 1, and the prohibition of disorderly conduct in Penal Code section 647, subdivision (a), the alleged offense occurred in the presentation of a dance before an audience. We shall point out that the performance of such a dance, like other forms of expression or communication, prima facie enjoys protection under the First Amendment of the Constitution of the United States; it loses such protection upon a showing of its obscenity. To show such obscenity, however, the prosecution must introduce evidence that, applying contemporary community standards, the questioned dance appealed to the prurient interest of the audience and affronted the standards of decency accepted in the community.

In interpreting the terms "lewd" and "dissolute" as used in the statutes under which defendants were charged, the trial court held such words to be synonymous with "ob-

scene" as used in Penal Code section 311 which defines obscenity. Once the First Amendment protection applies to the dance as a medium of expression, and once the court charges the jury in the terms of the obscenity statute, proof that the dance, in the context of contemporary standards, appealed to the prurient interest of the audience and exceeded the customary limits of candor became essential to conviction. The absence of that proof must therefore nullify the judgment.

2. *The performance of a dance for an audience constitutes a method of expression that, in the absence of proof of obscenity, warrants the protection of the First Amendment.*

Although the United States Supreme Court has not ruled on the precise question whether the performance of a dance is potentially a form of communication protected against state intrusion by the guarantees of the First and Fourteenth Amendments to the federal Constitution, the very definition of dance describes it as an expression of emotions or ideas. Thus, "Dancing consists in the rhythmical movement of any or all parts of the body in accordance with some scheme of individual or concerted action which is expressive of emotions or ideas." (7 Encyclopaedia Britannica (1945) pp. 13-14.) The Century Dictionary and Cyclopedia defines dance as follows: "dance—A succession of more or less regularly ordered steps and movements of the body, commonly guided by rhythmical intervals of a musical accompaniment; any leaping or gliding movement with more or less regular steps and turnings, expressive of or designed to awaken some emotion. The dance is perhaps the earliest and most spontaneous mode of expressing emotion and dramatic feeling; it exists in a great variety

of forms and is among some people connected with religious belief and practice, as among the Mohammedans and Hindus." (2 The Century Dictionary and Cyclopedia (1914) p. 1450.)

The Supreme Court has held that analogous media of expression, such as motion pictures, come "within the ambit of the constitutional guarantees of freedom of speech and of the press. *Joseph Burstyn, Inc., v. Wilson,* 343 U.S. 495." (*Jacobellis v. Ohio* (1964) 378 U.S. 184, 187 (judgment of the court per Brennan, J.); see also *Flack v. Municipal Court* (1967) 66 Cal.2d 981.) "It cannot be doubted that motion pictures are a significant *medium* for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging . . . to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." (*Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 501.) (Fn. omitted; italics added.)[1]

The above analysis merely makes applicable to a particular medium the general doctrine that *all* forms of communication, not merely the expression of concrete and

1. Other courts have applied these constitutional protections to various types of entertainment. In *Hudson v. United States* (D.C.Ct.App. 1967) 234 A.2d 903, for example, the court struck down a conviction for staging obscene shows, stating that "in addition to applying to printed matter, such as books and photographs, the same standards are also extended to motion pictures, plays, and burlesque shows, which are forms of speech and *prima facie* expressions protected by the First Amendment." In *Adams Theatre Co. v. Keenan* (1953) 12 N.J. 267, 270, the Supreme Court of New Jersey said: "The performance of a play or show, whether burlesque or other kind of theatre, is a form of speech and *prima facie* expression protected by the State and Federal Constitutions. . . ." (See also *Adams Newark Theatre Co. v. City of Newark* (1956) 22 N.J. 472, 475.)

definite ideas, *potentially* receive First Amendment protection.[2] "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. . . . Though we see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." (*Winters v. New York* (1948) 333 U.S. 507, 510.) "Also encompassed [within the right of freedom of speech] are amusement and entertainment as well as the exposition of ideas." (*Weaver v. Jordan* (1966) 64 Cal.2d 235, 242.)[3]

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2. Indeed, the concepts of "potential" and prima facie First Amendment protection are becoming increasingly important in areas other than obscenity law. The restricted and literal approach to the definition of speech protected by the First Amendment is gradually being replaced by an emphasis on the interest in communication, whether or not promoted by conduct that is precisely speech. The protection of this interest depends upon a balancing process: the weighing of the interest of the state in suppressing or regulating the questioned conduct as against the opposing interest in the interchange of ideas. (Compare *Brown v. Louisiana* (1966) 383 U.S. 131 (opinion of Fortas, J.) with *Cox v. Louisiana* (1965) 379 U.S. 559, and *Adderley v. Florida* (1966) 385 U.S. 39. See also *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 506-507; *People v. Woody* (1964) 61 Cal.2d 716, 718.) California's obscenity law here at issue represents merely a special, albeit well-established, example of this balancing of interests to determine whether First Amendment guarantees apply to a particular example of communication or whether sufficiently important state interests dictate a contrary result.

3. Unquestionably, these cases provide First Amendment protection for communication that in fact exhibits no special relationship to the political process. Even to the extent that it is possible, for example, to isolate and enumerate precise opinions or concepts in a Joyce or Shakespeare, the ideas they espouse might well have little apparent relevance to the political process. Yet no one could doubt that these works warrant First Amendment protection.

One rationale for this result is that, although the First Amendment is designed to protect only communication that forms the

In light of this approach, the performance of the dance indubitably represents a medium of protected expression. To take but one example, the ballet obviously typifies a form of entertainment and expression that involves communication of ideas, impressions, and feelings. Similarly, Iser's dancing, however vulgar and tawdry in content, might well involve communication to her audience. In fact, the Attorney General basically argues that Iser's dance violated the statute because it communicated improper ideas to her audience. This implicit admission of the Attorney General undermines his preliminary contention that the dance does not enjoy at least a prima facie protection of the guarantees of the First Amendment. Precisely because, as the Attorney General points out, the performed dance primarily constitutes a form of expression and communication, it potentially merits First Amendment protections.

The prima facie applicability of the First Amendment to this medium of communication, the dance, does not fail

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basis for workable democrary in the exchange of ideas relevant to political decisions, "[t]he line between the informing and the entertaining is too elusive" (*Winters v. New York, supra,* 333 U.S. 507, 510) and courts must therefore cast a wide net over all forms of communication in order to protect that which is of potential political relevance. An equally persuasive rationale, however, is that the life of the imagination and intellect is of comparable import to the preservation of the political process; the First Amendment reaches beyond protection of citizen participation in, and ultimate control over, governmental affairs and protects in addition the interest in free interchange of ideas and impressions for their own sake, for whatever benefit the individual may gain. (Cf. Kalven, *The Metaphysics of the Law of Obscenity* (1960) Sup. Court Rev., p. 1.) In any event, the apparent lack of relevance of the dance here at issue to any political decisions is immaterial; under either rationale the dance potentially merits First Amendment protection. Thus the First Amendment cannot be constricted into a straitjacket of protection for political expression alone. Its embrace extends to all forms of communication, including the highest: the work of art.

merely because the particular form of its manifestation may be obnoxious to many persons. Although the Attorney General contends that "topless dancing," as performed in the instant case, cannot itself demonstrate any social value worthy of protection under the First Amendment, it is "as much entitled to the protection of free speech as the best of [dance]" (*Winters v. New York, supra,* 333 U.S. 507, 510). "The line . . . is too elusive" (*id.*) to allow for particularized judgments as to whether each individual example of expression possesses social values meriting First Amendment protection.

Of course a conclusion that Iser's theatrical dance prima facie gains a First Amendment protection does not affect the central question presented in this case: whether her performance loses this privileged status because it is obscene. (*Roth v. United States* (1957) 354 U.S. 476.) As the Court of Appeal in *Landau v. Fording* (1966) 245 Cal.App.2d 820, 823, said as to the comparable medium of motion pictures, "While motion pictures, like other forms of expression, are within the ambit of the constitutional guarantees of freedom of speech and of the press (*Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495), obscenity is not subject to those guarantees (*Roth v. United States,* 354 U.S. 476)." In short, the People's argument that, unlike other forms of dance, such as ballet, Iser's dance appeals to prurient interests, must turn on whether the performance was obscene, not on whether dance in general or "topless" dancing in particular can achieve constitutional protection.[4]

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4. Petitioners strongly argue that the language "lewdly" in Penal Code section 314, subdivision 1, and "lewd or dissolute" in Penal Code section 647, subdivision (a), is unconstitutionally vague. At least for the present purpose of determining the alleged obscenity of a dance performed before an audience for entertainment, we interpret, as did the trial court below, the terms "lewd"

Nor can we accept the prosecution's sweeping argument that "standards required of an obscenity prosecution are inapplicable in this case" because the "conduct standing alone is clearly unlawful" and does not become lawful "because it is engaged in during an activity" which would be afforded First and Fourteenth Amendment protections. Petitioner's apparent "unlawful conduct" consisted of the baring of her breasts; the thrust of the argument presumably is that since such conduct could not be lawfully engaged in at any place and any time and under any and all circumstances it is not entitled to constitutional protection when performed in the different context of a theatrical performance.

The conduct here of course took place during a theatrical performance of a dance before an audience. We have previously explained that such a dance enjoys constitutional protection. The proper issue here therefore turns on whether the alleged unlawful conduct, which is inextricably a part of the dance, forfeits constitutional protection because of its alleged obscene nature.

To isolate the questioned conduct and to judge it in an entirely different context would be to distort the nature of this case. By fictitiously changing the manner and place of its performance the prosecution would make the conduct criminal although in the actual manner and place of its

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and "dissolute" as identical to "obscene," a term that section 311 of the Penal Code defines with as much precision as legislatures and courts have been able to muster in this complex and confusing area. So interpreted, no vagueness objection to section 314, subdivision 1, or section 647, subdivision (a), is tenable. (*Mishkin v. New York* (1966) 383 U.S. 502, 506.) At the same time, however, by making more specific the scope of section 314, subdivision 1, and section 647, subdivision (a), we necessarily involve ourselves in an issue of constitutional dimension: whether the prosecution has offered sufficient proof of each element of obscenity prescribed by section 311 of the Penal Code.

performance the conduct should be tested by constitutional standards.

Thus acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene. Respondent's contention would automatically reject the application of the law of obscenity to the instant case. It would adjudicate Iser's conduct as if it were not performed on the stage, not a dance, and not incorporated in a form of communication. Yet the entire point of the case is that the conduct occurred in that very context.

3. *Pursuant to section 311 of the Penal Code the People must prove that, applying contemporary community standards, the expression in question appealed to the prurient interest of the audience and so exceeded customary limits of candor as to be offensive.*

As we have explained, the trial judge, quoting Penal Code section 311, instructed the jury that "Obscene means that to the average person, applying contemporary standards, the *predominant appeal* of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, *which goes substantially beyond customary limits of candor* in description or representation of such matters and is matter which is utterly without redeeming social importance." (Italics added.)

In approaching petitioners' contention that the prosecution's failure to introduce evidence of contemporary community standards constitutes reversible error, we face a preliminary question: do we apply the test of contemporary community standards to whether the predominant

appeal of the matter is to "prurient interest" only or do we also apply it to whether the representation "goes substantially beyond customary limits of candor"? Clearly the Penal Code contemplates that the test of community standards applies to the question whether the *predominant appeal* of the material is to "prurient interest." The decision of the United States Supreme Court in *Roth v. United States, supra,* 354 U.S. 476, from which the Penal Code language emanated, clearly contemplates that test. The *Roth* opinion expresses the issue to be "whether . . ., applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (*Id.* at p. 489.) Thus the *Roth* decision, in addition to the explicit textual connection in section 311 between "prurient interest" and "contemporary community standards," requires that the prurient interest of Iser's dance be judged by contemporary community standards.

The more difficult question turns on whether the reference in the section to "customary limits of candor" also contemplates a test by community standards. Although *Roth* did not list such a requirement, and the language of the Penal Code is at best ambiguous, recent decisions by the United States Supreme Court suggest an affirmative answer. In *Memoirs v. Massachusetts* (1966) 383 U.S. 413, 418, a plurality opinion (Brennan and Fortas, JJ., and Warren, C.J.) modified the *Roth* test as follows: "Under this [*Roth*] definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) *the material is patently offensive because it affronts contemporary community standards* relating to the description or representation of sexual matters; and (c) the material is utterly

without redeeming social value."[5] (Italics added.) (See also *Redrup v. New York* (1967) 386 U.S. 767, 770-771.) Moreover, Justices Harlan and Stewart, announcing the judgment of the court in *Manual Enterprises v. Day* (1962) 370 U.S. 478, presaged part (b) of the reassessment articulated in *Memoirs* by reversing a finding of obscenity because the materials were not "so offensive . . . as to affront current community standards of decency." (*Id.* at p. 482).

In sum, a majority of the United States Supreme Court have apparently concluded that a finding of offensiveness to the accepted community standards of decency forms a prerequisite to a conclusion of obscenity. In order to conform to the Supreme Court decisions and to avoid questions of constitutionality, we interpret the words "customary limits of candor," as used in section 311 of the Penal Code, to require a showing that the material so exceeds customary limits of candor as to affront contemporary community standards of decency.

4. *The convictions must be set aside because the People failed to introduce proof of contemporary community standards.*

Having thus established a definition of obscenity, we face the question whether the People sufficiently proved all of its elements to support a conviction. We conclude the convictions must be set aside because the prosecution failed to introduce any evidence of community standards, either that Iser's conduct appealed to prurient interest or offended contemporary standards of decency.

We note at the outset the conflict of the authorities on the manner of proof of community standards. Some cases

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5. Petitioners do not so much as claim that their convictions should be set aside on the ground of the "redeeming social value" of Iser's dance. Thus we do not reach the problem of whether the dance was "utterly without redeeming social value" and we certainly do not hold that it met that test.

have held that the issue of obscenity can be resolved from the material or conduct itself without expert testimony or other evidence relevant to contemporary community standards. (E.g., *Newark v. Humphres* (1967) 94 N.J.Super. 384, 390-391; *City of Chicago v. Kimmel* (1964) 31 Ill.2d 202, 206; *Kahm v. United States* (5th Cir. 1962) 300 F.2d 78, 84-85, cert. den., 369 U.S. 859.) Others have held that in the absence of a showing by expert testimony that the questioned expression or conduct affronted the standards of the community, proof of obscenity failed. (*Dunn v. Maryland State Board of Censors* (1965) 240 Md. 249, 257; *United States v. Klaw* (2d Cir. 1965) 350 F.2d 155, 167.)[6]

Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards. We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards.[7] An even-

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6. For a more complete list of authorities, see Comment, *Expert Testimony in Obscenity Cases* (1966) 18 Hastings L.J. 161, 170 fns. 61, 62, and 174 fn. 79.

7. In fact we rejected, in another context, final determination of obscenity by subjective reaction of the jury in *Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901. Responding to the contention that independent appellate review of the alleged obscenity of material is inappropriate because *Roth* focuses the test of obscenity on community standards and the jury by definition represents the community, this court said: "[W]e do not believe that the definition of 'obscene' material as that which 'to the average person . . . predominant appeal . . . is to prurient interest . . . ' . . . indicates that the ultimate determination of that question is always for the jury. These words fix a *standard* which is to be applied to the material; they do not designate the body which is to apply the standard. The statutory language does not inherently predicate a

handed application of the criminal law, even with evidentiary guidance (cf. *In re Newbern* (1960) 53 Cal.2d 786, 797), is sufficiently difficult in an area so confusing and intricate as obscenity. To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror. (Cf. *United States v. Klaw, supra,* 350 F.2d 155, 167.) "[C]ommunity standards . . . can . . . hardly be established except through experts. . . . There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. . . . Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.'" (*Smith v. California* (1959) 361 U.S. 147, 165 (Frankfurter, J., concurring).)[8]

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question for the jury; it merely frames a definition." (*Id.* at p. 911.) Similarly, in the instant case formulation of the obscenity test in terms of community standards does not suggest a ruling that the jury can reach a subjective judgment on the definition of the standard; the emphasis on the concept of "community" necessarily indicates the requirement for an objective standard.

8. Some courts that, as a general rule, require proof of community standards have held that an expression can be so patently obscene as to obviate that requirement (e.g., *Womack v. United States* (D.C.Cir. 1961) 294 F.2d 204, 206, cert. den., 365 U.S. 859). In the instant case, however, we need not decide whether to adopt this exception in California. In brief, this case involves a "topless" dance shown only to adults (cf. *Ginsberg v. New York* (1968) 390 U.S. 629) who knew exactly what they were going to see. Since this conduct is not so patently offensive as to violate any conceivable community standard, we need not decide whether evidence of community standards must be introduced in an extreme and unquestionable situation.

Moreover, since we designate the State of California as the relevant "community" for this case, we cannot realistically expect the trier of fact to understand intuitively how the community as a whole would react to allegedly obscene material. "Knowledge of contemporary community standards . . . is no more available to the trier of facts than the innumerable other facts which must normally be proved in an evidentiary way in many other trials." (*Hudson v. United States, supra,* 234 A.2d 903.) The use of "contemporary community standards" as part of the constitutional test for obscenity does not in any way indicate that a jury inevitably can accurately apply this standard without guidance; rather, the "community standard" of the entire State of California is an ascertainable, albeit ephemeral, phenomenon subject to evidentiary proof to a jury selected from a local area, just as is any other question of fact.[9]

Finally, even if the jury should be deemed to be a metaphysical embodiment of the "community," and therefore intrinsically cognizant of community standards, proof of community standards would nevertheless be indispensable to effective appellant review. An appellate court must reach an independent decision as to the obscenity of the material. (*Zeitlin v. Arnebergh, supra,* 59 Cal.2d 901, 908-909.) Since an appellate court certainly does not in any sense compose a cross-section of the community, it cannot effectively carry out this function in the absence of evi-

9. Although we do not minimize the difficulty in finding qualified experts for such purpose, most commentators and courts have concluded that this problem does not raise an insurmountable barrier. (Comment, *Expert Testimony in Obscenity Cases* (1966) 18 Hastings L.J. 161; Note, *The Use of Expert Testimony in Obscenity Litigation,* 1965 Wis.L.Rev. 113; *United States v. Klaw, supra,* 350 F.2d 155; *United States v. One Carton Positive Motion Picture Film Entitled "491"* (S.D.N.Y. 1965) 247 F.Supp. 450; *Trans-Lux Distrib. Corp. v. State Bd. of Censors* (1965) 240 Md. 98.)

dence in the record directed toward proof of the community standard.[10]

We conclude that the judgment must be vacated for lack of evidence as to whether, applying contemporary community standards, petitioner Iser's dance appealed to the prurient interests of the audience and offended accepted standards of decency.[11] "If there is no evidence in the rec-

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10. The only other justification sometimes offered for a holding that the prosecution need not introduce evidence of community standards rests upon an analogy to the jury's function in cases involving a determination of negligence. In a negligent homicide case, for example, the jury divines the conduct of a reasonably prudent man without expert testimony or other evidentiary assistance and then applies this standard to the proven facts. Some courts conclude from this practice that a jury also should be allowed to apply the obscenity test without proof of community standards. (E.g., *Kahm v. United States, supra,* 300 F.2d 78, 84.)

The analogy fails primarily for practical reasons. "Community standards" are a complex compendium of attitudes and practices pervading the geographical entity serving as the relevant "community" — in this case, the State of California. (See p. 25, infra.) A locally selected jury, without evidentiary guidance, cannot realistically be expected to appreciate this interplay sufficiently to render an accurate verdict, especially when the issue at stake is the crucial one of defining criminal conduct. (Cf. *United States v. Davis* (2d Cir. 1965) 353 F.2d 614, 617 (Waterman, J., dissenting).) In contrast, the jury, from their collective experience, are more likely to understand and appreciate the considerations relevant to an evaluation of how a reasonable man would act in given circumstances. That determination involves the finding of whether past conduct conformed to the historical standard of the common law. It does not embrace questions of empirical fact, such as the attitude or reaction of a geographical "community" not necessarily represented by a jury panel.

11. Although numerous cases have held that sufficiency of the evidence to support a conviction is not a proper issue on habeas corpus (*In re Manchester* (1949) 33 Cal.2d 740, 744; *In re Lindley* (1947) 29 Cal.2d 709, 723), the United States Supreme Court has declared that conviction of a crime without any evidence in the record to support the accused's guilt constitutes a denial of due process. (*Garner v. Louisiana* (1961) 368 U.S. 157, 173-174; *Thompson v. City of Louisville* (1960) 362 U.S. 199, 204, 206.) Since the present record contains no evidence as to contemporary community standards, a crucial element in the proof of guilt, the conviction of petitioners violated due process. Hence, habeas corpus is available. (*In re Harris* (1961) 56 Cal.2d 879, 880; *In re Johnson* (1965) 62 Cal.2d 325; *In re Waltreus* (1965) 62 Cal.2d 218, 221.)

ord upon which such a finding could be made, obviously the material involved cannot be held obscene." (*Jacobellis v. Ohio, supra,* 378 U.S. 184, 202 (Warren, C. J., dissenting).) Anything to the contrary in *People v. Williamson* (1962) 207 Cal.App.2d 839, 847, is disapproved.

5. *For purposes of determining the obscenity of the performed dance here in question the relevant "community" is the entire State of California.*

Since we have held that the failure by the People to introduce evidence of community standards nullifies the judgment in any event, we need not technically reach the issue of the definition of the nature of the community that should measure petitioners' conduct. In order to provide guidance in the event of further prosecutions, however, we hold that the trial judge correctly ruled that the relevant community is the State of California.

Four justices of the United States Supreme Court have pondered the question whether the First and Fourteenth Amendments require the use of a "national community" in determining whether a work is obscene, and they have split evenly on the issue: Justices Brennan and Goldberg have contended that a national standard is constitutionally compelled. (*Jacobellis v. Ohio, supra,* 378 U.S. 184, 192-194), but Chief Justice Warren and Justice Clark have reached the opposite conclusion (*id.* at p. 200). In the absence of guidance from the Supreme Court, lower courts are divided: the cases support at least three standards—national (*State v. Hudson County News Co.* (1963) 41 N.J. 247, 265; *Excellent Publications, Inc. v. United States* (1st Cir. 1962) 309 F.2d 362, 365 (dictum)), state (*McCauley v. Tropic of Cancer* (1963) 20 Wis.2d 134, 149), and "local" or citywide (*Gent v. State* (1965) 239 Ark. 474, reversed on other grounds *sub nom. Redrup v. New York, supra,* 386 U.S. 767).

The principal deficiency of the national standard lies in the fact that its application may well be almost unworkable in light of our holding that the People must introduce evidence relating to the standard in the chosen "community." Even if some modicum of uniformity of attitudes toward "topless' dancing pervades the entire nation, a proposition in itself doubtful, trial courts would be hard pressed, without substantially diluting the normal requirements for qualification as an expert witness, to find persons with the ability to testify knowledgeably as to that standard. (Cf. *Jacobellis v. Ohio, supra,* 378 U.S. 184, 200 (Warren, C.J., dissenting); *Ginzburg v. United States* (1966) 383 U.S. 463, 480 (Black, J., dissenting).)

Nor do any theoretical propostions grounded in the First Amendment press for a national standard. Although the application of diverse local standards to test the constitutionality of permissible "political" speech would certainly be subject to question, the law of obscenity represents simply the "present critical point in the compromise between candor and shame at which the community may have arrived here and now." (*United States v. Kennerley* (S.D.N.Y. 1913) 209 Fed. 119, 121 (Hand, J.).) Indeed, this compromise is inherent in elements of current definitions of obscenity, including "customary limits of candor" (*Jacobellis v. Ohio, supra,* 378 U.S. 184; Pen. Code, § 311) and "patent offensiveness" (*Manual Enterprises v. Day, supra,* 370 U.S. 478, 482). Different areas of the country, both in attitude and practice, undoubtedly do reach different compromises between "candor and shame," and we can conjure no reason for ignoring so obvious a reality. Certainly, all would agree that standards of obscenity are not immutable; they change with the character of whatever community we use for a testing ground. If we recognize and apply different standards based upon the particular

time that we test the conduct or material, we should not be disturbed by different standards based upon the place of the test; geography should assume a no more troublesome role than chronology.[12]

The strongest argument in support of a national community, that a non-national standard would produce the "intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency" (*Manual Enterprises v. Day, supra,* 370 U.S. 478, 488), does not apply with any force to the instant fact situation. Evaluation of "speech" that is designed for nationwide dissemination, such as books or films, according to a non-national community standard might well unduly deter expression in the first instance and thus run afoul of First Amendment guarantees. But we need not, in the instant case, reconcile this contention with the practical problems of producing evidence of national standards. Iser's dancing is purely local in nature, a subject matter obviously not intended for nationwide dissemination. Since the decision as to whether to stage a "topless" dance rests solely on local considerations, the problem that unduly restrictive local standards may interfere with dissemination of and "access to [such] material" as books or film does not arise in the instant case.

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12. Some jurists have urged that communities differ in many respects other than toleration of alleged obscenity; yet these differences have not justified diverse standards with respect to application of constitutional guarantees such as those in criminal procedure. (See, e.g., *Jacobellis v. Ohio, supra,* 378 U.S. 184, 194 (opinion of Brennan, J.).) Constitutional standards of criminal procedures, however, do not, at least explicitly, take into account "community" standards. The law of obscenity, on the other hand, by definition reflects a balancing of candor and shame in the community, and it is thus quite pertinent to inquire which community's attitudes should be the touchstone of decision.

With the alternative of using a national community eliminated, the choice lies between a statewide standard and some variant of a local community. It might be argued that the same theoretical considerations that induce a rejection of a national standard also apply to a statewide test. In particular, the compromise between "shame" and "candor" might vary within California from area to area. Moreover, the smaller the community chosen, the more likely it is that competent evidence of community standards will be available. Finally, if in the present case the prohibition mainly presumes both to protect the audience from its own alleged baseness and the local community from anticipated antisocial conduct arising from observance of the dance, as well as to save the local citizenry from toleration of the objectionable conduct, then the standard should be local. It should comprise either the area from which the audience is likely to be drawn or the area in which the citizenry may be affected by the proscribed dance.

Although these considerations are not *de minimis,* we conclude that on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of a smaller community: whether it should be city, county, individual neighborhood within a city, or whatever. Moreover, a strong policy favors uniformity in application of the state criminal law (cf. *In re Lane* (1962) 58 Cal.2d 99, 111 (Gibson, C.J., concurring)); we promote this policy by assuring that application of the obscenity law in this state will be based on a uniform "community."

The writ is granted. The judgments against Giannini and Iser are set aside. They are remanded to the custody

of the San Pablo Municipal Court for further proceedings, if any.

TOBRINER, J.

WE CONCUR:
TRAYNOR, C.J.
PETERS, J.
MOSK, J.
SULLIVAN, J.

## DISSENTING OPINION BY BURKE, J.

I dissent. I disagree with the majority that the prosecution was required to introduce expert testimony establishing contemporary community standards and that the relevant community in this case should be the entire State of California rather than the local community. No decision of the United States Supreme Court nor any statute cited by the majority compels the adoption of either rule. It is manifest that the majority's new rules will impose a difficult or impossible burden on local communities in combating obscenity. They will lead to a further lessening of local control over local affairs—a further removal of the power of self-government from the local citizenry and their duly elected and selected, responsible local officials—and inevitably, a deplorable lowering of standards in many local communities to conform to lower standards elsewhere.

Mr. Justice Potter Stewart, concurring in *Jacobellis* v. *Ohio*, 378 U.S. 184, noted that hard-core pornography is hard to define but that "I know it when I see it . . . ." (P. 197.) And the same can be said of lewd or dissolute conduct. Here, the police officers of the small City of San Pablo thought they saw such conduct in petitioner Iser's performance; they described it to the jury from the witness stand. The jury found petitioners guilty, and on appeal the judgment was affirmed. That should have ended the controversy.

The testimony of the police officers at petitioners' trial is in my opinion amply sufficient to support the conviction. The majority conclude otherwise on the basis of their newly adopted rule that the prosecution must introduce expert testimony establishing contemporary community standards. Why is such testimony required? Because, assert the majority, "To sanction convictions without expert evidence

of community standards encourages the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror." (*Ante,* p. 15.) "Moreover," state the majority, "since we designate the State of California as the relevant 'community' for this case, we cannot realistically expect the trier of fact to understand intuitively how the community as a whole would react to allegedly obscene material."[1] (*Ante,* p. 16.) And further, declare the majority, expert testimony of community standards is indispensable to effective appellate review.

These reasons are not persuasive. I agree with decisions which have expressly or impliedly concluded that a jury, properly instructed, or trial judge, is fully capable of determining whether conduct or material appeals to prurient interest and offends contemporary community standards, without expert testimony on the subject, and that such testimony is not essential to appellate review. *Kahm v. United States,* 300 F.2d 78, 84; *People v. Pinkus,* 256 A.C.A. 175, 180-181; *State v. Onorato* (Conn.) 216 A.2d 859, 860; *City of Chicago v. Kimmel* (Ill.) 201 N.E.2d 386, 388.) And, as we shall see, a state standard is wholly inappropriate for judging obscenity of a local public performance such as the one in question.

Surely this court's laudable concern with the preservation of essential liberty of expression should not blind the court to the practicalities of what it is now requiring be

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1. Here the trial court in instructing the jury regarding obscenity stated in part that the "standards which you must apply . . . are the standards of the community, and *the smallest community which you may consider is the State of California.*" (Italics added.) Although in my view the italicized statement is erroneous, petitioners do not now complain of the error. In any event, the error was or could have been raised on appeal, and habeas corpus ordinarily cannot serve as a second appeal. (*In re Waltreus,* 62 Cal.2d 218, 225; *In re Winchester,* 53 Cal.2d 528, 532.)

done as a prerequisite to curtailing the spread of obscenity in California. As a result of the majority opinion, local entities of government in prosecuting what were formerly regarded as ordinary justice or municipal court lewd or dissolute conduct cases will now be faced with the difficult or impossible task of introducing expert testimony establishing a state standard. The majority state that "the 'community standard' of the entire State of California is an ascertainable, albeit ephemeral, phenomenon subject to evidentiary proof" (*Ante,* p. 16), but the majority fail to offer any enlightenment as to how the so-called state standard is to be ascertained.

Would the toleration by a few metropolitan areas of "topless" gyrations of the type here in question establish the state standard for the more than 9,000 other cities and communities in California? If such isolated instances of unbridled license are to be the pacemakers for all communities in the state the result can only be a colossal and catastrophic lowering of standards throughout the state. Or if most California cities and communities do not permit such performances, does this establish the state standard? Or would one strive to strike an average in determining the state standard? If 100 communities have "topless" as against 9,000 that do not, then is 1/90th "topless" to be the state standard? Chief Justice Warren and Justice Clark have expressed the belief that there is no provable "national standard" (see *Jacobellis v. Ohio, supra,* 378 U.S. 184, 200 [dissent]),[2] and I similarly doubt that there is any provable state standard.

But even if there is such a standard, the same considerations that lead the majority to reject a national standard

2. In *Jacobellis v. Ohio, supra,* 378 U.S. 184, 192-194, Justices Brennan and Goldberg concluded that a national standard should be applied, but the issue was not decided by a court majority.

require the application of a local rather than state standard. The majority, in rejecting a national standard, state, "[T]he law of obscenity represents simply the 'present critical point in the compromise between candor and shame at which the community may have arrived here and now.' . . . Different areas of the country, both in attitude and practice, undoubtedly do reach different compromises between 'candor and shame,' and we can conjure no reason for ignoring so obvious a reality. Certainly, all would agree that standards of obscenity are not immutable; they change with the character of whatever community we use for a testing ground." (*Ante,* p. 19) The majority further point out that the strongest argument against a non-national standard, namely that it would result in denying some sections of the country access to material, there deemed acceptable, that elsewhere might offend prevailing community standards, does not apply with any force here, since petitioner Iser's dancing is "purely local in nature, a subject matter obviously not intended for nationwide dissemination." (*Ante,* p. 20) Patently, neither is her dancing intended for statewide viewing.

The majority also reject a national standard on the basis of the difficulty of obtaining qualified experts to testify regarding such a standard. A similar difficulty will exist in obtaining qualified experts to testify regarding a state standard.

It seems obvious that the imposition of such a burden in obscenity cases will result in increased permissiveness and a consequent downward trend of standards in this state. Also, as a result of the majority opinion, the high standards of many communities throughout this state will be forced downward to meet a lower level.

The only reasons advanced by the majority for concluding that a state standard is "more appropriate" are that

it avoids administrative problems in determining the exact scope of a smaller community and that "a strong policy favors uniformity in application of the state criminal law . . . ." (*Ante,* p. 21.) However, any such "administrative problem" is *de minimis* compared with the problem imposed by the majority upon local governmental entities of ascertaining a state standard and finding qualified experts to testify to it. In my opinion the controlling policy here should be to allow local communities the maximum control possible over local activities. If we deny this reasonable measure of local control, inevitably this court will have to bear its share of the weighty burden of having removed one of the last remaining barriers to the spread of obscenity into our residential communities.

I would discharge the order to show cause and deny the petition.

BURKE, J.

I CONCUR:
McCOMB, J.

## *Appendix B*

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code § 311 provides:

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which it utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code § 314 provides:

"Every person who wilfully and lewdly, either

"1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or

"2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

"Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288 of this code, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison for not less than one year."

5. California Penal Code § 647 provides in pertinent part:

"Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:

"(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

SUPREME COURT, U. S.

FILED

APR 24 1969

JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1968

**No. 1132**

STATE OF CALIFORNIA AND WALTER R. PEDRETTI, CHIEF OF POLICE OF THE CITY OF SAN PABLO, *Petitioners,*

vs.

ALBERT J. GIANNINI AND KELLEY ISER, *Respondents.*

## Answer to Petition for Writ of Certiorari to the Supreme Court of the State of California

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# In the Supreme Court of the United States

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ALBERT J. GIANNINI AND KELLEY ISER, *Respondents.*

## Answer to Petition for Writ of Certiorari to the Supreme Court of the State of California

Respondents, ALBERT J. GIANNINI and KELLEY ISER, pray that the petition for writ of certiorari herein be denied.

### JURISDICTION

Respondents contend that this case is moot because under the laws of the State of California they cannot be retried for the acts which are the subject matter of this case and because they can never suffer any sentence or disability due to the said acts.

### QUESTIONS PRESENTED

1. Whether the case is moot because the statute of limitations under the law of the State of California bars further proceedings against the respondents.

2. Whether a "topless" dance performed in the context of a theatrical production is entitled to the protection of the freedom of expression provisions of the First Amendment.

3. Whether it is unconstitutional for the California Supreme Court, in judging allegedly obscene matter, to hold that the relevant "community" from which the applicable standards must be taken was the State of California.

4. Whether the California Penal Code Sections 311 and 314 are unconstitutionally vague.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of California Penal Code Sections 1382 and 1387 are set forth in Appendix A hereto.

## STATEMENT OF THE CASE

The statement of the case as it appears in the petition is correct but incomplete. The court should be aware of the circumstances under which the "topless" dance was performed. A large sign with the word "topless" stood outside the night club. (RT 39-40) A small sign at the entrance indicated that persons under 21 years of age were not allowed and an employee checked at the door for identification to make sure no minors entered. (RT 53) Miss Iser danced to the popular music of the day provided by a small musical group. Her act was introduced by a master of ceremonies and after each number there was applause from the audience. (RT 42-43) Stage lighting and effects were used, and there was a public address system. All of the dancing was performed upon a stage. (RT 54-56) The dancing could not be seen from outside the club. (RT 52) The audience was at all times orderly and consisted of men and women. (RT 49)

## REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

### I. The Case At Bar Is Moot Because the Respondents Cannot Be Retired and Because They Can Never Suffer any Sentence or Other Disability Due to the Acts Which Are the Basis for This Action.

California Penal Code Section 1382 provides that unless good cause to the contrary is shown, a misdemeanor complaint must be dismissed when the defendant is not brought to trial after a reversal on appeal within thirty days after the remittitur is filed in the trial court. Furthermore, an order for the dismissal of the misdemeanor complaint is a bar to any other prosecution for the same offense. California Penal Code Section 1387.

The California Supreme Court decision granting the writ of habeas corpus and reversing the judgment of the trial court was final on December 14, 1968, and a certified copy of the decision was remitted to the trial court on December 16, 1968, and the remittitur was entered upon the records of the Supreme Court. As of the date of this Answer, the respondents have not been summoned to court for a new trial, a date has not been set, nor has any action whatsoever been taken to proceed against the respondents. Respondents have not agreed to any postponement or continuance of a trial date and have at all times stood ready to proceed to trial. Respondents have made a formal motion in the trial court for an order dismissing the complaint, and the motion is now pending.

Since it would appear that respondents are entitled to a dismissal of the complaint and since that dismissal is a bar to all further proceedings for the same offense, the respondents are not subject nor can they in the future be subjected to any sentence or other disability arising out

of the offense charged. Therefore, the case before this court is moot, and the petition for certiorari should be denied. *Jacobs v. New York,* 388 U.S. 431 (1967); *Tannenbaum v. New York,* 388 U.S. 439 (1967); *St. Pierre v. United States,* 319 U.S. 41 (1943).

## II. "Topless" Dancing Is a Form of Communication Entitled to the Full Freedom of Speech Protections Afforded by the First and Fourteenth Amendments.

Petitioners would have the court accept this case for decision in order to deny *prima facie* First Amendment protection to this dance because it was performed "live" rather than in a "fixed media of expression" such as a moving picture. They argue that the decisions of this court in the area of obscenity have all been cases involving "fixed media" communication and that the tests developed for determining obscenity in *Roth v. United States,* 354 U.S. 476 (1957) and subsequent cases do not apply to the "live" communication of ideas. The recent decision in *United States v. O'Brien,* 391 U.S. 367 (1968) is cited as authority for the above premise.

The parties agree on the characterization of the subject matter before the court. We are here concerned with a "live" theatrical performance, which happens to be in the art form of the dance, and which art form is used for the communication of ideas. Respondents suggest that this type of communication is entitled to the application of the constitutional tests for obscenity and that there is no basis either in decisions of this court or in reason for distinguishing between "live" and "fixed media" communication of ideas.

Though it may be true that the decisions of this court in the obscenity field have dealt exclusively with fixed media of expression, it does not follow that "live" expres-

sion is excluded from the protections accorded by the First Amendment. Respondents suggest that the decision of this court in *Jacobellis v. Ohio,* 378 U.S. 184 (1964) would have been the same if the subject matter had been a stage play rather than a screen play. The dance which was performed by respondent Iser should be tested by the same rules whether it was performed "live" or in the context of a moving picture. If any speech is protected at all, it surely must be the basic direct communication between persons by use of voice, gesture and body movement uncomplicated by the intervention of "fixed media."

The authority cited by petitioners for the distinction they would have this court make between "live" and "fixed media" communication is *United States v. O'Brien,* supra. The cited case is not an obscenity case and does not involve the question of "live" versus "fixed media" communication. The holding in that case would have been no different if Mr. O'Brien had burned his draft card before the movie camera and then showed the film to an audience for the purpose of communicating his opposition to war. The question which the *O'Brien* case considers is the problem which occurs when speech and non-speech elements are combined in the same course of conduct. The issue is whether the government can regulate the non-speech elements without infringing upon constitutional protections of freedom of speech. Respondents suggest that this is the real issue which petitioners seek to raise on this point, and it has nothing to do with whether or not the activity is performed "live" or in a movie.

In *United States v. O'Brien,* the court held that ". . . when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment

freedoms . . ." Respondents submit that government does not have a sufficiently important nonspeech interest in regulating the form of a dance, including the costume and bodily movements, to justify taking the acts in question outside the protection of the First Amendment. The petitioners reply that the states have a substantial interest in preventing "sexual misconduct."

But, the labeling of Miss Iser's dance as "sexual misconduct", in fact, assumes the question which is in issue and does not help to supply an overriding governmental interest because nobody knows what "sexual misconduct" is. This court has declined to hold the portrayal of the naked body, including genitalia, as obscene *per se. Manual Enterprises v. Day,* 370 U.S. 478 (1962); *Sunshine Book Co. v. Summerfield,* 355 U.S. 372 (1958) (per curiam). Furthermore, the portrayal of "sexual misconduct" on the stage is a legitimate exercise of free speech if it is not obscene. Thus, all roads lead back to the basic question of obscenity, and the only way to make a determination of obscenity is by using the rules of the *Roth case* and subsequest decisions and by applying the judicial litmus to the acts in question—which is exactly what the California court held.

The main reason that the *O'Brien* case does not apply is because O'Brien was not performing his act of draft card burning in the context of a theatrical performance. Respondents contend that this court has long since decided that the First Amendment protections shall be prima facie extended to the performing arts. *Jacobellis v. Ohio,* 378 U.S. 184 (1964). In *Winters v. New York,* 333 U.S. 507 (1948), the court stated, "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the in-

forming and the entertaining is too elusive for the protection of that basic right."

In all kinds of theatrical performances, including the dance, speech and nonspeech elements are inextricably combined. That which may be called "conduct" when it occurs on the street, when put in the context of a play, movie or dance, is in fact a part of the total attempt to communicate with the audience. To attempt "incidental" restrictions on the so called "nonspeech" or "conduct" parts of a piece of entertainment is in effect to abridge the entire piece of communication being presented.

Petitioners would have this court change the rule giving *prima facie* First Amendment protection to conduct occurring in the context of a theatrical performance because overt sexual acts could be committed with impunity merely by including them in the script of a play or theatrical production. The answer to this argument is that the protection afforded to theatrical performances is only *prima facie* and not complete. The conduct must be judged by the rules; and if it is found to be obscene, it may be proscribed and punished. Under the California Statute, the matter will be adjudged obscene and not entitled to protection if it "goes substantially beyond customary limits of candor in description or representation of such matter." Clearly, the danger of our stages being made havens for sexual perversion is not great under such a test and the trier of fact and the reviewing courts should have little difficulty in dealing with the extreme examples set forth by the petitioners. See *Dixon v. Municipal Court*, 267 A.C.A. 875 (1968).

**III. It Is Not Unconstitutional for the Purposes of Determining the Obscenity of the Performed Dance Here in Question to Hold that the Relevant "Community" Is the Entire State of California.**

Petitioners correctly state that there is a conflict among state and federal courts as to the proper "community" to be used in determining what the community standards of decency are under the tests set forth for the determination of obscenity. This court has not ruled on this question. Petitioners would have the court accept this case so that a "variable community" rule could be adopted, the relevant community to be determined in each case by the "type of media involved, the probable extent of its distribution and the intended or probable recipient audience." Petitioners cite *Ginsberg v. New York,* 390 U.S. 629 (1968) and *Mishkin v. New York,* 383 U.S. 502 (1966) as authority for this proposition.

The two cases cited by the petitioners do not involve the question of "community standards." *Ginsberg v. New York* held that minors do not have the same rights in the area of freedom of expression as adults and that the States may constitutionally restrict the freedom of children where they could not do so for adults. The *Mishkin* case dealt with the problem of "prurient interest" and refined the anti-*Hicklin* definition of *Roth* to include matter within the ambit of obscenity if it appealed to the prurient interest of a clearly definable deviant sexual group and not just to the prurient interest of the "average person." The fact that for the purpose of defining prurient interest the court in *Mishkin* looked to the "intended and probable recipient group" does not lead to the conclusion of the petitioners that this must be the test for determining the relevant community standard to be applied. This concept is taken completely out of context by the petitioners, and it is not authority for their broad and unique proposition that the extent of the rele-

vant community must vary with each different kind of communication and each different kind of audience.

Even if it is assumed that a variable community standard is desirable, which is a highly questionable proposition, this court should not adopt such a sweeping rule in this case, for the court would be required to set down rules based upon cases and fact situations not before it. If such a rule were announced in general terms, such as the terms used by the petitioner, the court would thereupon invite a deluge of cases arising from every combination of the three variables—media of communication, extent of distribution and intended or probable audience. Members of this court have from time to time expressed concern over the tremendous volume of obscenity cases with which the court is now beset. A variable community standard rule without a specific classification of all possible fact situations would increase this volume many times over.

Respondents contend that for any media, any audience and any purpose connected with the definition of obscenity under the First Amendment, the designation of a local community as the relevant community in determining the community standard is an unreasonable and dangerous abridgment of the freedom of speech. Such a rule would create a literal "jigsaw puzzle" for the producer, performer or writer. The particular community standards of each county, district, or town would have to be ascertained before controversial sexual ideas or themes could be introduced. A mistake as to the local community standard could result in criminal punishment for the performer or the writer. Also, some of the factors, such as probable audience and area of dissemination, might easily be outside the control of the artist, producer or writer who would, nevertheless, be held criminally responsible under the variable standard rule. Thus, the application of a variable local standard would either present a serious problem of due process and

equal protection of the law *vis a vis* the writer or performer who dared to venture into the community whose standard was unknown, or it would produce a great deterrent to the free exchange of ideas among all of our communities. Such a variable local standard, or rather a myriad of standards, would produce voluminous litigation and would make it impossible to apply the criminal statutes of a state uniformly and equally throughout the entire state.

Even if this court were of the opinion that in the case at bar a local standard is appropriate, the decision of the California Court must be upheld. States are free to adopt a definition of obscenity which is more stringent than that required by the Federal Constitution. *Mishkin v. New York,* supra, at page 383. The California court has held that the standard must be measured by the entire state of California. This rule puts more of a burden upon the prosecution to prove such a standard and also allows much greater freedom of expression than would be allowed under a local standard. Since the California rule is less of a restriction on free speech and is a more stringent test for obscenity than the "local standard" rule, this court should uphold the decision in any event.

## IV. The California Penal Code Sections 314 and 647(a) Are Unconstitutionally Vague.

The respondents vigorously attacked the two criminal statutes in the court below on the ground that they were unconstitutionally vague. The portion of the Petition for Writ of Habeas Corpus devoted to the question of uncertainty is attached hereto as Appendix B. The California Supreme Court did not reach the issue of uncertainty because it accepted respondents' contention that the words "lewdly" and "lewd and dissolute" in Penal Code Sections 314 and 647(a) as applied to a theatrical performance were

identical to "obscene" as that term is defined in Penal Code Section 311 which is in turn an embodiment of the pronouncements of this court. See *In Re Giannini and Iser,* 69 A.C. 588 (1968), footnote 4, page 9, of Appendix A of the Petition for Writ of Certiorari.

Although petitioners admit that they must accept the interpretation of the statute as made by the California Supreme Court, if their argument that the dance performance here in question is not entitled to *primâ facie* First Amendment protection, prevails, respondents will be effectively deprived of a determination as to whether or not the statutes are unconstitutionally vague. Petitioners argue on the one hand that the interpretation of the California Court is binding under *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963) and *Kingsley Pictures Corp. v. Regents,* 360 U.S. 684 (1959), but on the other hand they ask this court to hold that the dance here in question is not entitled to the protection given by the California Court's interpretation.

Therefore, respondents submit that if the petitioners' view is accepted by the court, and this court holds that the dance here in question is not entitled to *prima facie* First Amendment protection, that the case must then be remanded to the California Supreme Court for a determination of the question of whether or not the statutes in question are unconstitutionally vague, or, in the alternative, this court should rule on the question.

## CONCLUSION

For the reasons submitted above, respondents respectfully submit the writ of certiorari prayed for by the petitioners should be denied.

KENNETH LARSON
*Attorney for Respondents.*

**(Appendices follow)**

## *Appendix A*

1. The pertinent provisions of California Penal Code Section 1382 provides:

> "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:
>
> * * *
>
> 3. Regardless of when the complaint is filed, when a defendant in a misdemeanor case in an inferior court is not brought to trial . . . in case the cause is to be tried again following . . . an appeal from the inferior court, within thirty days . . . after the remittitur is filed in the trial court. . . ."

2. California Penal Code Section 1387 provides:

> "An order for the dismissal of the action, made as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony."

## *Appendix B*

**I. California Penal Code Sections 314.1 and 647(a) Are so Vague, Ambiguous and Indefinite as to Provide No Ascertainable Standards for Determining Guilt, and to Permit the Arbitrary, Capricious and Discriminatory Abridgement of Speech, Press and Expression and Other Lawful Conduct Contrary to the Free Speech and Press, the Due Process, and Equal Protection Provisions of Article I, Sections 9, 11, 13 and 21 of the California Constitution and the Applicable Provisions of the First and Fourteenth Amendments to the United States Constitution.**

A. *"Void for Vagueness" Judicial Tests.*

The terms of a criminal statute must be sufficiently definite to inform those who are subject to it what conduct on their part will make them liable to penalty. A statute with terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the essentials of due process of law. *Connally v. General Construction Co.*, 269 U.S. 385, 391. All presumptions favor the validity of a statute and mere doubt is not sufficient reason for a judicial declaration of invalidity. *Lockheed Aircraft Corporation v. Superior Court,* 28 Cal. 2d 481, 484. The mere fact that different interpretations of a penal statute are possible does not make it unconstitutional. *In re Davis,* 242 C.A.2d 645, 652.

B. *The Uncertainties and Ambiguities of the Statutes.*

1. Penal Code Section 314.1 on its face presents several problems of interpretation and application which might prove difficult for a court of law to solve let alone a layman who is required to regulate his conduct according to the terms of the statute or suffer the penalties prescribed. Does the word "person" mean, as the trial Court held, the "whole person", that is, complete nudity, or does it mean any single part or portion of the person? If it means any single part or portion of the person, then why was it necessary to insert the words, "or the private parts thereof"? Does

the expression "private parts" refer only to the genitals or to the genital area? Does the expression "private parts" refer only to the organs of sex or excretion, or does it also apply to such areas as the navel, arm-pit, inside of the thigh or to the human breast? If the exposure of the human breast is meant to be prohibited, is it only the female breast which is included in the statute, and, if so, is it the entire breast or only portions of the breast such as the mammilla?

2. Another term in Section 314.1 which is not clear is the requirement that the exposure take place "in any place where there are present other persons to be annoyed thereby". Does this mean that the lewd acts may be performed in a non-public place as long as the acts do not actually offend or annoy any person present? Does it mean that the statute does not apply if the persons present consent to the performance? Or, does it merely mean that the lewd acts are outlawed, even in a private place, if there are *any* persons present who *might possibly* be annoyed or offended? Or, does it mean that the proscribed acts violate the section if in fact there are any persons present, *regardless of* whether or not the said persons are, or might be, offended or annoyed? If the last suggested alternative is correct, then does not the statute seem to proscribe otherwise lawful sex acts between husband and wife, or between consenting adults?

3. Finally, there is the central requirement of both of the statutes in question that the acts proscribed must be done "lewdly". What does "lewd" or "lewdly" mean? Does it depend upon the motive or intent of the performer? Does it depend upon the effect which the acts have on the persons present regardless of the motive or intent of the performer? Does it depend upon the tendency or likelihood of the act to appeal to the prurient interests of the persons

present regardless of its actual effect upon them, and, regardless of the intent or motive of the performer? Does the term "lewdly" mean "in an obscene manner" as the word "obscene" is defined in Penal Code Section 311?

C. *The Statutes Have Not Been Made Certain by Judicial Construction.*

Though statutes may be on their face vague and uncertain, judicial construction may give it meaning and such construction becomes a part of the statute "as if it had been so amended by the legislature." *Camp v. Bd. of Public Instruction,* 368 U.S. 278.

1. No cases have been found which provide any definite meaning or solve the problems of interpretation presented by the terms "person or private parts thereof" and "in any place where there are present other persons to be annoyed thereby" as they appear in Penal Code Section 314.1. There are judicial constructions of the terms "lewdly" and "lewd" and "dissolute". These decisions will be considered below.

2. The only case to consider the questions of the meaning of the term "lewdly" as used in Section 314.1 is *People v. Succop,* 249 ACA 277 (March 7, 1967). The defendant in that case was found guilty of exposing his penis in public before women and children. The acts were isolated incidents and were not a part of any stage production or night club entertainment. The issue of the vagueness of the term "lewdly" was raised by the defendant who acted at the trial and on appeal *in propria persona.* The Court summarily held that the term was not unconstitutionally vague. There was no attempt to define the term and the Court merely cited as authority for its holding the case of *People v. Loignon,* 160 Cal. App. 2d 412, which had upheld a similar term in Penal Code Section 288.

3. In *People v. Loignon, supra,* the defendant was convicted of committing oral copulation on a child. He contended on appeal that Penal Code Section 288 was unconstitutional in that the words "lewdly", "lewd" and "dissolute" and "lascivious" rendered it too vague to meet the requirements of due process. The Court held that the terms were not too vague for they were words of "general meaning" and were used in a sphere vital to the community, i.e. the welfare of its youth. The Court offered no definition or explanation of what the words meant. For authority the Court cited the case of *People v. Diebert,* 117 Cal.App. 2d, 410.

4. *People v. Diebert, supra,* involved a prosecution of a bar owner for selling intoxicants to minors in violation of Section 702 Welfare and Institutions Code, since repealed, which prohibited acts "which cause or tend to cause or encourage a minor to lead an idle, dissolute, lewd or immoral life". The Court upheld the statute against the attack based upon the uncertainty of the terms "idle", "dissolute", "lewd" and "immoral". The Court did not attempt to define the terms, or state their meaning, but incorporated the definitions given in *People v. Babb,* 103 Cal. App. 2d 326.

5. In *People v. Babb, supra,* the defendant was charged with violating Penal Code Section 286, but he was convicted of the old vagrancy statute, Penal Code Section 647.5, as a lesser included offense. This section of the statute was later held unconstitutional and finally repealed entirely in 1961. The relevant portions of the statute then read as follows: "Every idle, or lewd, or dissolute person . . . is a vagrant . . .". The Court held that the statute stated a public offense and went on to define the terms "lewd" and "dissolute" as follows: "Lewd and dissolute are terms often used interchangeably. Each applies to the unlawful indul-

gence in lust whether in public or private (*In re McCue*, 7 Cal.App. 765, 766) 'Lewd' is defined to mean: 'f. Lustful; libidinous; lascivious; unchaste'. 'Dissolute' is defined to mean: '2. . . . loose in morals and conduct; wanton; lewd; debauched'. (Webster's New Inter. Dict., 2d ed)".

6. The synonyms given by the Court above for the terms in question do not supply the required certainty for they are each susceptible to uncertainties of their own which are equally undefined by judicial interpretations or construction. The characterization by the Court that "lewd and dissolute" apply to the "unlawful indulgence in lust", circumvents the very question in issue, i.e. what is unlawful indulgence in lust? Unfortunately, judicial interpretation and definition does not aid in supplying the answers to the questions raised regarding the meaning of the terms in issue. Moreover, each of the cases which seek to uphold the definitions of the terms "lewdly" or "dissolute" all deal with fact situations which, (1) do not involve freedom of speech, press, artistic expression or theatrical entertainment, and (2) they deal either with juvenile delinquency or overt sexual acts or trespasses. The Courts have never in any written opinion applied either of the questioned statutes to cases where nudity or exposure of the human body occurs in the context of a theatrical performance or a stage production.